No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF THE CENTER FOR INDEPENDENT MEDIA, CALITICS.COM, EYEBEAM, ZACK EXLEY, LAURA MCGANN, AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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July 31, 2009

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STATEMENT OF INTEREST[1]

Amici the Center for Independent Media, Calitics.com, Eyebeam, Zack Exley and Laura McGann are institutions and individuals who use new technologies, including the Internet, to produce, create, and/or distribute news stories, commentary and editorials about politics, including federal elections. They share an interest in campaign finance regulations that protect the rights of journalists and new media content providers to report and comment on federal elections through the use of new technologies.

Founded in 2006, the Center for Independent Media is a non-partisan, non-profit organization that operates an independent on-line news network. The impetus for creation of the organization was the hypothesis that a melding of blog technology with the standards of professional journalism could produce original news and information, which in turn would contribute to diversifying public debate around issues of importance. To this end, the Center for Independent Media enhances the stability of independent media by working with on-line journalists and blogs to support their ability to inform public debate through journalism that adheres to the highest standards of

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[1] The parties have consented to the filing of this brief. Appellant's letter of consent has been lodged with the Clerk of Courts. Appellee has granted a blanket consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

the profession. The Center operates a new journalist training program and a new journalist editorial program. As a result of these programs, over 41,884 original reports have been generated, reaching over 16.4 million Americans.

Calitics.com is an on-line, open source news organization that posts news stories, commentary and editorials on California and national politics, including federal elections. The site features reports and commentary by Calitics.com's seven-member Editorial Board and blog posts from members of the public who are invited to register with the site.

Eyebeam is a non-profit organization that provides artists and technologists the space to use state-of-the-art technologies to engage with culture, addressing the issues and concerns of our time. Since 1997, Eyebeam has supported more than 125 fellowships and residents who use new media to engage in both social and political commentary. Eyebeam's artists have used broadcast media to engage in such commentary, including a project that aggregates Internet content on broadcast television through a low-power analog transmitter. The project acts as an aggregator of on-line video content, encouraging the public to create shows, vote on the shows, and participate in the process.

Zack Exley is a leader in the use of new technology and federal election reporting and commentary. He is currently a writer for the Internet newspaper, the HuffingtonPost.com, where he covers politics, including federal elections. Consequent to his early use of the Internet as a medium for political commentary, representatives of then Governor George

W. Bush filed an FEC complaint in 1999 that Mr. Exley's political Web site, GWBush.com, violated campaign finance regulations. Mr. Exley is also an expert in the use of new technologies in campaigning. He was Director of On-line Organizing and Communications at Kerry-Edwards 2004 and has served as Organizing Director at MoveOn.org.

Laura McGann is an experienced journalist whose work has been featured in both traditional and new media outlets. She is currently the editor of *The Washington Independent*, an on-line newspaper of politics and policy. Her work has also been featured in traditional media, such as the Dow Jones Newswires, the Associated Press's national wire and *The Wall Street Journal*.

Amicus curiae the Brennan Center for Justice at NYU School of Law ("Brennan Center") is a non-partisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center's Campaign Finance Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution. Through legislative efforts and litigation, the Brennan Center actively supports strong federal campaign finance laws that meet constitutional standards and encourage broad candidate participation in federal elections. The Brennan Center served as co-counsel to Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords in *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld the provisions of the Bipartisan Campaign Reform Act ("BCRA") that Appellant now challenges.

SUMMARY OF THE ARGUMENT

The Court requested supplemental briefing on the question of whether the Court should "overrule either or both *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?"

Amici respectfully submit that the answer to that question is no. In this case, the Court's decision to expand the scope of inquiry from a narrow, fact-driven, as-applied challenge to encompass facial constitutional questions undeveloped in the record below has the potential to transform a relatively straightforward case – readily resolved on narrow grounds – into a far more problematic one. Appellant and its supporting *amici* invite the Court to decide this case based, not upon the narrowly tailored statutes and regulations before it, but as a preventative measure against hypothetical action Congress or federal regulators might someday take. The Court should pull back from the brink of this unwarranted expansion of judicial power and should, instead, resolve the issues using deeply embedded and time-worn distinctions that have allowed political speech by all speakers to flourish while reducing the risk of corruption and the appearance thereof.

Appellant, in its supplemental brief, devotes much of its attention to the extemporaneous responses of government counsel to a series of hypothetical questions posed by the Court. At oral argument, the Court raised questions with regard to whether Section 203's limitation to broadcast media was

constitutionally required. In responding to these queries, government counsel suggested that the Constitution would not necessarily bar such expansion of the electioneering communications regulation to other forms of media. (Tr. Oral Argument at 26:20-27:22.) In so responding, counsel was answering within the context of the Court's hypothetical – his answer had no application to the statutory text of BCRA or the FEC regulations and opinions interpreting it.

Using this oral argument colloquy as a straw man, Appellant now invokes the threat of government censorship: "When the government of the United States of America claims the authority to *ban books* because of their *political speech*, something has gone terribly wrong." (Appellant's Supplemental Br., (dated July 24, 2009), at 2.) Yet few threats could be more untethered from the current state of legal practice and settled law.

By focusing on speculative hypotheticals rather than the specifics of this case, Appellant ignores the very steps that Congress and the FEC have taken to ensure that Appellant's Orwellian scenario of federal "superintendence of printed political speech," *id.* at 1, never comes to pass. In essence, Appellant's argument is a slippery slope – it claims that it is infeasible to draw the dividing line between corporate campaign advertisements and other political speech. However, the statutory language and regulations at issue here, as well as the history of campaign finance regulation in this country, demonstrate that this slippery slope is fictitious.

In submitting this brief, *amici* seek to restore the Court's attention to the actual statute and regulations at issue here. The lines separating corporate-funded campaign advertisements from other forms of political speech are largely unproblematic. Indeed, these categorical determinations have proven sufficiently adaptable to exempt new and developing forms of political speech from the regulation of corporate campaign advertisements. Appellant has provided no basis for this Court to take the extraordinary step of overruling key precedents, or the functioning system of campaign finance regulation predicated upon them. *See*, *e.g.*, *Randall v. Sorrell*, 548 U. S. 230, 244 (2006). ("[T]he rule of law demands that adhering to our prior case law be the norm.").

Moreover, by asking this Court, in effect, to issue an advisory opinion against some future law that Congress might someday pass or some future regulation the FEC might someday promulgate, Appellant suggests that this Court should overstep the most significant check on its power – Article III's limitation of federal judicial power to actual cases and controversies.

ARGUMENT

I. BCRA's Electioneering Provisions Maintain a Longstanding Distinction Between Corporate Campaign Contributions and Expenditures and Other Forms of Political Speech.

Throughout the history of campaign finance reform, lawmakers and courts have consistently maintained the First Amendment line between regulating

corporate contributions and expenditures, on the one hand, and other forms of political speech deemed to bear a lesser risk of corruption, on the other. Since the early twentieth century, Congress has exercised its constitutional authority to regulate elections by seeking to prevent corporations and unions from exerting undue influence or the appearance thereof over federal candidates. *See, e.g.*, Tillman Act, ch. 420, 34 Stat. 864 (1907) (prohibiting corporate contributions of "money . . . in connection with" any federal election); Federal Corrupt Practices Act, ch. 368, § 301, 43 Stat. 1070 (1925) (extending the prohibition in the Tillman Act to "anything of value" and making the acceptance of a corporate contribution a crime); Smith-Connally Act, ch. 144, § 9, 57 Stat. 163, 167 (1943) (extending the prohibitions to unions); Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (prohibiting expenditures by corporations and unions). In 1972, Congress enacted the Federal Elections Campaign Act (FECA), a law that reenacted earlier statutes prohibiting corporations from using general treasury funds for contributions and expenditures in federal elections, while permitting such entities to make contributions and expenditures through separate segregated funds. Federal Elections Campaign Act of 1971, Pub. L. No. 92-255, tit. III, § 316, 86 Stat. 3 (1972). After *Buckley v. Valeo*, 424 U.S. 1 (1976), was decided, Congress amended FECA to take into account this Court's holdings.

The next major development in the regulation of corporate political spending was the passage of BCRA in 2002. This Court upheld nearly every major aspect of BCRA against facial challenge in *McConnell,* including Section 203, which was crafted to plug a loophole that permitted corporations to use

electioneering communications to circumvent FECA's regulatory structure. *McConnell*, 540 U.S. at 204. Rather than being "outliers," as Appellant suggests, this Court's decisions in *Austin* and *McConnell* are deeply embedded in the case law and federal campaign finance reform framework.

While advancing the important anti-corruption goals of campaign finance reform by regulating undue corporate influence over federal elections, both lawmakers and courts have consistently crafted statutes, regulations, and case law to ensure that such campaign finance regulations do not extend to political speech that lacks similar potential for corruption. For example, as the supplemental brief *amicus curiae* for the Reporters Committee for Freedom of the Press (hereafter "Reporters Committee") sets out, for more than 50 years, in enacting and interpreting campaign finance statutes and regulations, lawmakers, courts, and regulators have respected the special position of the news media in First Amendment law. (Reporters Committee Supplemental Br., (dated July 24, 2009), at 6-9.)

Indeed, BCRA's media exemption codified this protection of the news media with respect to the regulation of electioneering communications, *id*. at 6; 2 U.S.C. § 434(f)(3)(B)(i), following this same clear distinction between corporate-funded campaign advertisements and other forms of political speech. By Congressional design, electioneering communications regulations apply only to that narrow subset of communications that Congress deemed most likely to raise the specter of corruption or the appearance of corruption – namely, corporate or union broadcast advertisements that clearly identify a candidate for

federal office, are aired within a certain time period prior to an election, and target a significant portion of the relevant electorate. 2 U.S.C. §§ 434(f)(3), 441b(b)(2). Following this Court's decision in *Wisconsin Right to Life II*, to be subject to BCRA's funding restrictions, the advertisement, on its face, must also allow for no reasonable interpretation other than as an appeal to vote for or against a given candidate. *FEC v. Wisconsin Right to Life ("WRTL II")*, 551 U.S. 449, 469-70 (2007).

This narrow subset of electioneering communications is itself subject to a number of crucial exemptions that ensure that BCRA's regulation of corporate and union broadcast electioneering communications neither extends to nor chills political speech. These exemptions include, but are not limited to, the *MCFL* political non-profit exemption, *FEC v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 263-64 (1986), as well as BCRA's statutory exemption for news media, which we discuss in greater depth in Section III, *infra.*

II. BCRA's Narrowly Crafted Electioneering Communications Provisions Leave More Than Ample "Breathing Room" for Political Speech to Flourish.

Far from constituting a *ban*, as Appellant mischaracterizes BCRA's regulations, the regulations at issue merely require corporations and unions to use PACs, rather than general treasury funds, to pay for electioneering communications. To call this regulation a *ban* is mere hyperbole – a citizen might just as well state that she is *banned* from contributing more than $200 to a federal candidate if she fails to provide the

requisite contribution disclosure form. Citizens United and other corporations remain free to fund *Hillary: The Movie* and other forms of electioneering through segregated funds.

More importantly, Appellant's use of the word "ban" obscures the fact that *Hillary: The Movie* only fell under the FEC's regulatory purview to the extent that it was being broadcast through cable within 30 days of a federal primary election. Citizens United was able to sell the DVD of the movie during that period and would have been able to distribute *Hillary: The Movie* through multiple channels without falling within BCRA's definition of an electioneering communication. (Appellant's Br., (dated Jan. 8, 2009), at 5.) This narrowly crafted regulation bears no resemblance to Appellant's specter of government censorship.

Indeed, it is worth noting that, contrary to the dark picture of government suppression painted by Appellant, in the years since BCRA was enacted, political speech has flourished. Non-candidate entities spent more money on election-related communications in 2008 than in any previous election cycle. David B. Magleby, *The Change Election: Money, Mobilization, and Persuasion in the 2008 Federal Election* 59 (2009). Corporations and unions engaged in unprecedented levels of political communications, including broadcast advertisements. For example, the U.S. Chamber of Commerce ran broadcast advertisements mentioning federal candidates by name that totaled millions of dollars in spending in 2008 Senate races. Labor unions also spent millions of dollars on broadcast advertising directed at federal races. *Id*. at 80. In light of the healthy levels of involvement in elections by outside

groups – including those falling within the scope of BCRA's electioneering communications provisions – as well as the lack of evidence that there has been any chilling effect on political speech by either *McConnell* or *Austin*, this Court has no reason to overrule its prior precedent.

III. Section 203 Does Not Chill the First Amendment Activities of Journalists and Commentators in Either Traditional or New Media.

Given the rapidly evolving landscape of media technology, where blogs and "viral" videos compete for public attention with the traditional news media, there is some confusion among "content providers," legal commentators, and the general public as to how pre-Internet legal concepts and frameworks apply in a post-Internet world. Indeed, in its initial brief *amicus curiae*, the Reporters Committee expressed concern that since the text of BCRA's news media exemption explicitly exempts only speech that "[a]ppears in a news story, commentary, or editorial distributed through the facilities of [a] broadcast, cable, or satellite television or radio station," it might not protect journalists who distribute their work in other forms or media. (Reporters Committee Br., (dated Jan. 15, 2009), at 10.)

As a threshold matter, it is important to recognize that the scope of the media exemption is not properly before the Court on the facts of this case. Citizens United – which purchased air time for *Hillary: The Movie* as an advertiser would for an "infomercial" – is not a new or traditional media organization, nor has it

suggested at any point that mere production of a film, without more, should transform it into such an entity.

Moreover, the Reporters Committee's concerns regarding the scope of the media exemption ignore two crucial facts: First, the scope of regulation of BCRA's electioneering communications provision is expressly limited to broadcast advertisements, which Congress deemed to pose the greatest risk of corruption and the appearance of corruption. Second, lawmakers and regulators have consistently interpreted the media exemption – which has been recognized in campaign finance law since the early 1970s – to give the broadest and most flexible possible protection to journalists and other content providers, given the rapid evolution in media technology and institutions.

IV. By Congressional Design, BCRA's Electioneering Communications Regulations Apply Only to Broadcast Advertisements, and Exclude Other Forms of Media from the Scope of Regulation.

In enacting BCRA, Congress's concern was to counter the risk of corruption inherent in the proliferation of "sham issue" advertisements. *McConnell v. FEC*, 540 U.S. 93, 128-129 (2003) (citing record evidence that candidates requested "maxed-out" donors to give additional funds to non-profit corporations to spend on 'issue' advocacy"). In seeking to combat this corrupting practice, Congress chose to regulate only electioneering communications in the broadcast medium, where it deemed the greatest potential for corruption to lie.

Additionally, the legislative history indicates that Congress specifically considered and rejected the inclusion of Internet communications within the scope of electioneering communications. 144 Cong. Rec. S974 (1998) (statement of Sen. Snowe, sponsor of an early version of BCRA, stating that the definition of an electioneering communication would not include the Internet). Later, in a move consistent with legislative history, the FEC excluded "communications over the Internet, including electronic mail," from the definition of electioneering communications. 11 C.F.R. § 100.29(c)(1).

Thus, the limitation of the scope of the electioneering communication to broadcast media is no mere "qualifier" that can be changed by "a mere 'legislative fix,'" as the Reporters Committee mistakenly contends. (Reporters Committee Supplemental Br. at 5 n.3.) Instead, the broadcast limitation was specifically considered by Congress, and there is no reason to believe that Congress would perform an about-face and extend the scope of BCRA to other forms of media.

V. BCRA's Media Exemption Is Sufficiently Flexible to Protect the Speech of Journalists in Both Traditional and New Media.

In the campaign finance reform context, courts and lawmakers have consistently recognized that media entities that devote "their resources . . . to the collection of information and its dissemination to the public" play a "unique role" that distinguishes them from other corporations. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667-68 (1990). Thus, even

in enacting narrowly tailored campaign finance regulations such as BCRA, Congress has taken pains to craft specific exemptions for media entities. This Court has upheld such exemptions at least three times. *See McConnell v. FEC*, 540 U.S. 93, 207-09 (2003); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986). This "belt and suspenders" approach assures the news media that even if statutory language or regulations were to change, their protections would remain unabated.

Appellant's claim that the media exemption applies only to the "institutional media" is unfounded. (Appellant's Supplemental Br. at 1.) Federal regulators have interpreted the scope of BCRA's media exemption to remain in step with advancements in media technology and with changes in media institutions. As evidenced by the FEC's advisory opinions, the FEC has consistently construed the media exemption to apply to a variety of non-traditional media. *See, e.g.*, 2007-20 Ad. Op. FEC 1-2 (2007) (national satellite radio channel featuring content by bloggers and podcasters exempt under media exemption); 2003-34 Ad. Op. FEC 1-2 (2003) (production company's reality television show simulating a presidential campaign and related Web sites exempt under media exemption). Thus, in the event that new developments in media technologies or institutions cause journalists, bloggers, or other media producers uncertainty with regard to the scope of the exemption, they may always seek an advisory opinion from the FEC.

Moreover, the FEC has interpreted the precursor to BCRA's media exemption provision – a parallel media exemption provision under FECA – to offer broad and flexible protection to non-traditional media, including Internet communications. The FECA media exemption was crafted to "assure[] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. at 4 (1974). Accordingly, the FEC issued a rule clarifying that it was Congress's intent to extend FECA's "media exemption to forms of media that did not exist or were not widespread when Congress enacted the exemption." Internet Communications, Final Rules and Explanation and Justification, 71 Fed. Reg. 18589, 18608 (April 12, 2006). As such, the FEC was to construe FECA's media exemption to protect "news stories, commentaries, and editorials no matter in what medium they are published." *Id.* Thus, in 2006, the FEC amended its media exemption regulations to include "any Internet or electronic publication," 11 C.F.R. §§ 100.73, 100.132.

Finally, in addition to exempting new forms of media technology, the FEC has also afforded non-traditional media institutions broad protection. The FEC has interpreted the media exemption to take account of the changing structure of media institutions, so that non-traditional media entities, in addition to "institutional media," fall within the scope of the media exemption. Indeed, as part of its 2006 Internet rulemaking, the FEC explicitly created an Internet exemption for:

> any corporation that is wholly owned by one or more individuals, that engages primarily in

> Internet activities, and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities.

11 C.F.R. §§ 100.94(d), 100.155(d). Thus, regardless of the rapid pace of technological and institutional evolution in the realm of political speech, the media exemption has consistently proven sufficiently adaptable and has extended flexible coverage to both new and traditional media technologies and institutions.

CONCLUSION

That the rapid advent of new media technologies and institutions – including the "Video-on-Demand" technology used in the present case – has left certain gray areas in which Congress and regulators have yet to act does not provide this Court with any reason to overturn an entire body of established constitutional precedent. To the extent that the Court is concerned about the treatment of communications that are available to the viewer on-demand, it should, at minimum, permit the FEC in the first instance to conduct a rulemaking to determine the appropriate contours of a new exemption.

But even if this Court decides to rule on the merits of the narrow factual issue presented by this as-applied challenge, we would ask the Court to limit its opinion to the specific facts and carefully crafted statutory scheme and regulations before it, rather than reaching into the realm of hypothetical speculation. Both Appellant and the Reporters Committee call on this Court to provide "clarity" as a safeguard against the unlikely occurrence that Congress will perform an

about-face on decades of deference to First Amendment freedoms in the area of campaign finance regulation. *Amici* respectfully urge the Court to reject this invitation to invade legislative prerogatives; it is not the role of Article III courts to provide prophylactic opinions.

Dated:
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